(29,808)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 498

NICHOLAS WEBSTER, APPELLANT,

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR; J. GEORGE WRIGHT, SUPERINTENDENT OF THE OSAGE AGENCY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1923

[fol. 1] **IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA**

In Equity. No. 566

NICHOLAS WEBSTER, Plaintiff,

vs.

ALBERT B. FALL, Secretary of the Interior of the United States, et al., Defendants.

CITATION AND SERVICE—Filed July 31, 1923

UNITED STATES OF AMERICA, ss:

Albert B. Fall, Secretary of the Interior of the United States; J. George Wright, Superintendent of the Osage Agency, and George N. Wise, Special Disbursing Agent, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to an appeal allowed and filed in Clerk's office of the United States District Court for the Western District of Oklahoma, wherein Nicholas Webster is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness the Honorable John H. Cotteral, Judge of the United States District Court for the Western District of Oklahoma, this 28th day of July, 1923.

John H. Cotteral, Judge.

As Attorney of record for the defendants, J. George Wright, Superintendent of the Osage Agency, and George N. Wise, Special Disbursing Agent, I hereby acknowledge and accept service of the above and foregoing citation, this 31st day of July, 1923, and hereby enter an appearance in said appeal for said appellants, J. George Wright and George N. Wise.

Roy St. Lewis, Asst. United States Attorney for the Western District of Oklahoma and Attorney of Record for J. George Wright and George N. Wise.

[File endorsement omitted.]

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

BILL IN EQUITY—Filed Dec. 9, 1922

The plaintiff, Nicholas Webster, brings this suit for relief upon behalf of himself, and upon behalf of all members or persons on the Osage Roll, similarly situated as is this plaintiff, who may wish to join herein, and share in the relief granted by this suit, and alleges that the plaintiff is a citizen of the United States, residing and living at Fairfax, Osage County, Oklahoma; that he is a member of the Osage Tribe of Indians, his name being opposite number 184 on the official roll of said tribe; that the defendant Albert B. Fall is the Secretary of the Interior of the United States; that the defendant J. George Wright is the Superintendent for the United States in charge of the Osage Agency, and resides and receives his mail in Pawhuska, Oklahoma, the seat of the Osage Agency, same being an Indian Agency for and over the Osage Tribe of Indians in Oklahoma, and established by the United States; that the defendant George N. Wise is a Special Disbursing Agent of the United States whose duty is to pay and disburse the funds and moneys due Individual Osages to such individual, the said Wise residing in Pawhuska, Oklahoma, the seat of the Osage Agency.

[fol. 3] 2. This suit is brought to enjoin the defendants, and each of them, from enforcing against this plaintiff section 2087 of the Revised Statutes of the United States, as well as all orders, rules or regulations, written or verbal, which section, orders, rules and regulations deprives this plaintiff of his property and liberty without due process of law, and in violation of the 5th Amendment to the Constitution of the United States; and, to enjoin the arbitrary, unlawful, and capricious acts and conduct of the defendants, their agents and employees, which acts and conduct of said defendants deprives this plaintiff of his property and liberty without due process of law, and in violation of the 5th amendment to the Constitution of the United States, and the plaintiff avers that the right and matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

3. That the defendant, J. George Wright, as Superintendent of the Osage Agency is the local representative of the Department of the Interior for the Osage Agency and has charge as Superintendent of the Osage Agency and its employees, but under the direction of the Secretary of the Interior, to whom, and his agents and employees the Superintendent makes his reports as such Superintendent; that as such Superintendent he, in conjunction with the defendant, George N. Wise, is charged with the duty of making the quarterly payments to Osage Allottees.

4. That the defendant George N. Wise, as such Special Disbursing Agent of the United States, is, among other things, charged with the

duty of making quarterly requisition on the Treasury Department of the United States, for money with which to make payment to the individual Osage Allottees, and the said George N. Wise does make such quarterly requisitions, and does receive the money with which to make such quarterly payments, and does receive the money with which to pay quarterly this plaintiff, the amount due this plaintiff and other Osage Allottees, but the said George N. Wise and the said J. George Wright fail and refuse to make the quarterly payments to this plaintiff, as required by law, as will be more fully set forth hereinatfer.

[fol. 4] 5. That by virtue of a treaty of September 29th, 1865, between the United States and the Osage Tribe of Indians, the Osages conveyed to the United States, as trustees for sale, the lands owned by the Osage Tribe of Indians in the State of Kansas; that the United States as such trustees, sold said Kansas lands, for, to-wit, the sum of $10,660,000, of which received sum $8,327,000 was placed in the treasury of the United States to the credit of the Osage Tribe or Nation of Indians, upon which credited amount the United States paid interest at the rate of five per centum per annum to the said Osage Tribe; that from the said amount received from the sale of the said Kansas Lands, aforesaid, the Osage Tribe of Indians purchased from the Cherokee Indians, for a consideration of $1,099,000, the present lands of the Osages in Oklahoma, taking title in the name of the United States, "In trust nevertheless and for the use and benefit of the Osage Indians."

6. On June 28, 1906, the President of the United States approved an Act of Congress, entitled "An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes;" that said Act of June 28, 1906 (hereinafter referred to as the Allotment Act) provided for the making of a roll of the "legal membership" of said Osage Tribe, which said roll when completed was made up and consisted of 2,229 Osages, and such roll contained then, and now contains, the name of this plaintiff; that by virtue of authority given in said Allotment Act the surface of said Osage Reservation was allotted to the individual members of said Osage Tribe, and this plaintiff received his pro rata share of such lands formerly owned by the Osage Tribe of Indians, by a deed in fee-simple, said deed containing a restriction against alienation, except as provided in said Allotment Act; that said Allotment Act provided for the issuance of certificates, upon application, to the adult members of said tribe, or allottees, which certificate authorized the individual allottee to sell and convey his surplus lands, the homestead of each allottee to remain inalienable until otherwise provided [fol. 5] by Congress, except in such Act provided.

7. That under authority of said Allotment Act, the oil, gas, coal and other minerals in and under said allotted lands were reserved to the Osage Tribe of Indians for a period of twenty-five years, said mineral lands to be leased by the said tribe through its Tribal Council, subject to the approval of the Secretary of the Interior.

8. Said Allotment Act provides that all the funds belonging to the Osage Tribe, and all moneys due, or that might become due, to the Osage Tribe from the sale of their lands in Kansas, and on claims against the United States, shall be held in trust by the United States for a period of twenty-five years, except that said funds and moneys, aforesaid, should be segregated and placed to the credit of the "individual members of the Osage Tribe on a basis of a pro rata division among the members of said tribe," as shown by the authorized roll of membership provided for in said Act, "or to their heirs," said credit to draw interest as provided by law, which was and is at the rate of five per centum per annum, said interest to be "paid quarterly to the members entitled thereto".

9. Said allotment Act further provided, that the royalties received from oil, gas coal and other mineral leases mentioned above, "shall be placed in the treasury of the United States to the credit of the members of the Osage Tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this Act, and the same shall be distributed to the individual members of said Osage Tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States."

10. Said Allotment Act provides that the lands, moneys, and mineral interests herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs according to the laws of the State of Oklahoma; that by virtue of the foregoing provisions of law, this plaintiff became the owner of a fixed, vested individual interest in the moneys and mineral interests, aforesaid, same being due and payable quarterly.

[fol. 6] 11. On April 18, 1912, an Act of Congress became effective, entitled, "An Act Supplementary to an Amendatory of the Act of June 28, 1906," wherein authority was given to the Secretary of the Interior, upon application therefor, to pay to the Osage Allottees all or part of the funds held in the treasury of the United States to their individual credit; and, that any individual member of the Osage Tribe, being an adult, may dispose of any or all of his estate, real, personal or mixed, by will, in accordance with the laws of Oklahoma, such will being subject to approval by the Secretary of the Interior, and many Osage Allottees have withdrawn their funds from the treasury, and their estate was conveyed by will upon their death, as provided for in this Supplementary Act, aforesaid.

12. By virtue of and in accordance with the above provisions of law, this plaintiff became entitled to and there was segregated and placed to his credit in the treasury of the United States the sum of $3,819.00, drawing interest from the United States at the rate of five per centum per annum, and this plaintiff became entitled to and there has been placed to his credit in the treasury of the United States, and paid to him quarterly, his pro rata share from the income produced and received from oil and gas, and from oil and gas leases, except, that from March 3, 1921, the income, aforesaid, has been

paid only in part to this plaintiff, and the remainder has been wrongfully and unlawfully held by the defendants.

13. That on March 3, 1921, there became effective an Act of Congress, section 4 of which Act, among other things, provides: "That from and after the passage of this Act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency [fol. 7] $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, * * * all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the Superintendent of the Osage Agency,——".

14. That prior to 1915, Lo-tah-tse-a, an enrolled member of the Osage Tribe of Indians, whose name is opposite the number 364, died, leaving this plaintiff as a surviving husband; that the courts of Oklahoma adjudged this plaintiff to be entitled to a one-half interest in the moneys and mineral interests of his deceased wife, Lo-tah-tse-a, the same being interests and estate acquired by Lo-tah-tse-a as an allottee under the Act of June 28, 1906; that the aforesaid adjudication of the courts was recognized by the Interior Department of the United States, and an extra one-half pro rata share, as provided in the Allotment Act, was transferred and placed to the credit and account of this plaintiff on the books and records of the Interior Department, and the Treasury Department of the United States, and by reason thereof this plaintiff was paid by the defendants herein, and at the regular quarterly Osage payments, the one-half interest and income due this plaintiff from the estate of Lo-tah-tse-a, deceased, up until the March, 1921 payment, and since the March, 1921 payment, and because of the Act of March 3, 1921, this income from the estate of Lo-tah-tse-a has not been paid by the defendants.

15. That the income of this plaintiff due from the sources aforesaid, as an allottee of property formerly owned by the Osage Tribe of Indians, and due and payable to this plaintiff by the defendants since March 3, 1921, is in excess of $12,000; that the income from the sources aforesaid due this plaintiff during the same period of time and from the estate of Lo-tah-tse-a, deceased, same to be paid by and through the defendants, is in excess of $6,000, and $1,000 should have been paid by the defendants each quarter since March 3, 1921.

16. That in accordance with the Act of March 3, 1921, aforesaid, the defendants have paid, generally speaking, all adult Osage allot- [fol. 8] tees having a certificate of competency all of their said in-

come as such allottees, as provided in the said Act of March 3, 1921; that when making the quarterly payments these defendants have paid many adult allottees not having a certificate of competency the full amount of $1,000 as provided in said Act; that the money with which to pay this plaintiff has been subject to the command, disposal, check and warrant, of the defendants, J. George Wright and George N. Wise, but said defendants, J. George Wright and George N. Wise have failed and refused to pay this plaintiff the $1,000 due him at each quarterly payment under the Act of March 3, 1921, but they and each of them have unlawfully, arbitrarily, and capriciously withheld such $1,000 from this plaintiff, and have failed and refused to pay the same during the following quarter after the regular quarterly payment, until in July, 1922, there was due this plaintiff by virtue of the Act of March 3, 1921, in excess of $3,000, which amount was so unlawfully, arbitrarily and capriciously withheld by said defendants; that there was a regular quarterly payment made in September of 1922, and a regular quarterly payment is to be made in December, 1922, and other and many quarterly payments to follow until the year 1946; that this plaintiff is forty-seven years of age, of sound body, and in the natural course of men of his age and physical condition should live many years in which to receive and enjoy the income to be paid to him at the regular quarterly payments, aforesaid.

17. That during the year 1918, the predecessors in office of the defendant, Albert B. Fall, and the defendants J. George Wright and George N. Wise, held-up and refused to pay and make these quarterly payments to many Osages, same consisting of the income aforesaid, and at other times to other Osages, including this plaintiff, they have so refused, said refusal being because of and based upon section 2087 of the Revised Statutes of the United States, and orders, and regulations issued under and by virtue of authority supposed to be and exist in said section 2087, and this plaintiff is informed, and such information is such that he believes the same to be true, and he believes, and so avers, that the said defendants have refused and do [fol. 9] now refuse to pay this plaintiff the money due him because of the authority supposed to be and exist in section 2087 of the Revised Statutes of the United States, and the orders, rules, and regulations issued to J. George Wright and Geo. N. Wise, by the defendant Albert B. Fall, and his predecessors in office, by their, and his agents and employees; that said section provides that "No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquor, nor while there are good and sufficient reasons leading the officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach of the Indians, nor until the chiefs and head-men of the tribe shall have pledged themselves to use all their influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country"; that the territory formerly constituting the Osage Indian Reservation is now Osage County in the

State of Oklahoma, under the State and Federal jurisdiction, with a population of about 40,000 people, only about 2,229 of whom are Indians, and the chiefs and head-men of the Osages have no authority or jurisdiction whatsoever in the enforcement of the liquor laws; that all of said acts and conduct, aforesaid, of the defendants in withholding the money of this plaintiff is to the great loss and irreparable injury of this plaintiff.

18. This plaintiff is advised by his counsel, and he therefore charges, that said section 2087 of the Revised Statutes of the United States, and all orders, rules or regulations issued by the Department of the Interior, its officers and employees, to the defendants J. George Wright and George N. Wise, insofar as said statute, orders, rules, and regulations are intended to apply to the withholding of the moneys and income of this plaintiff, due from the sources aforesaid, and under the Act of March 3, 1921, and the acts and conduct aforesaid, of the defendants J. George Wright and Geo. N. Wise in withholding said quarterly payments provided for in the Act of March 3, 1921, from this plaintiff, are violative of the Constitution of the United States in the following respects:

(a) That said section 2087, and said orders, rules and regulations, and said unlawful, arbitrary and capricious acts, deprives this plaintiff of his property without due process of law contrary to the provisions [fol. 10] of the 5th Amendment to said Constitution.

(b) That said section 2087, and said orders, rules, or regulations, and said arbitrary, capricious and unlawful acts, deprives this plaintiff of his liberty without due process of law contrary to and in violation of the 5th Amendment to the said Constitution.

(c) That said section 2087, said orders, rules or regulations, violates the Commerce Clause of said Constitution.

(d) That said section 2087, and said orders, rules or regulations violates the Tenth Amendment to said Constitution.

(e) That said section 2087, and said orders, rules or regulations, and said arbitrary,, capricious and unlawful acts, violates the spirit and intent of the entire Constitution.

19. Wherefore this plaintiff in as much as he is remediless in the premises according to the strict rules of the common law, and can have complete relief only in a court of equity where matters of this character are properly cognizable, and to prevent a multiplicity of suits by this plaintiff, files this complaint in equity, and prays:

20. That the defendants, Albert B. Fall, Secretary of the Interior of the United States; J. George Wright, Superintendent of the Osage Agency; and, George N. Wise, Special Disbursing Agent, may be required to make direct, true and complete answer to this bill, but not under oath (answers under oath being hereby waived); that section 2087 of the Revised Statutes of the United States, all orders, rules or regulations, and all unlawful, arbitrary and capricious acts of the defendants, which deprives the plaintiff of his property and

liberty without due process of law, each and all be adjudged to violate the Constitution of the United States and to be void; that a temporary injunction may immediately issue and upon final hearing be made permanent; (1) enjoining the said Albert B. Fall, as Secretary of the Interior, J. George Wright as Superintendent of the Osage Agency, and George N. Wise, Special Disbursing Agent, and each of them, their successors in office, and each, every and all persons claiming to act under their, or any of their, authority or control [fol. 11] from enforcing section 2087 of the Revised Statutes of the United States as against the plaintiff herein, and from enforcing any order, rule or regulation which deprives this plaintiff from receiving $1,000 quarterly, as provided by the Act of March 3, 1921; (2) enjoining the defendants J. George Wright, and George N. Wise from refusing to pay this plaintiff $1,000 quarterly as required by the Act of March 3, 1921.

21. That upon final hearing a mandatory injunction may issue against said defendants J. George Wright and George N. Wise, commanding and requiring that the moneys and funds due this plaintiff under the Act of March 3, 1921, be transferred, assigned and paid over unto this plaintiff. And to such other and further relief as the nature of this case may require, and to the Court shall seem meet and proper.

22. That a writ of subpœna of the United States directed to Albert B. Fall, Secretary of the Interior of the United States; J. George Wright, Superintendent of the Osage Agency; and, George N. Wise, Special Disbursing Agent, may issue, commanding them on a certain day to appear and answer this bill, and to abide by and perform such decree as may be entered by this court.

Preston A. Shinn, Solicitor for Plaintiff.

STATE OF OKLAHOMA,
County of Osage, ss:

Nicholas Webster of lawful age, and being first duly sworn, says that he is the plaintiff in the foregoing bill, and that he has had said bill read to him, and that he knows the contents thereof, and that all the allegations of said bill are true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

Nicholas Webster.

Subscribed and sworn to before me this 4th day of December, 1922. Margaret Curry, Notary Public. (Seal.) My Commission expires Sept. 20, 1926.

[File endorsement omitted.]

[fol. 12] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

MOTION TO DISMISS—Filed December 27, 1922

Come now J. George Wright, and George N. Wise, two of the defendants above named, by J. W. Scothorn, Assistant United States Attorney, and for their separate motion, move the court to dismiss the above styled cause for the following reasons to-wit:

1st. For that *their* is no equity shown in the bill.

2nd. For that the subject matter of the bill is exclusively within the political division of the United States Government and is not subject to review by this court.

J. W. Scothorn, Assistant United States Attorney, Solicitor for the Defendants J. George Wright and George N. Wise.

[File endorsement omitted.]

[fol. 13] IN UNITED STATES DISTRICT COURT

[Caption omitted]

ANSWER—Filed April 16, 1923

Now comes the defendants J. George Wright and George N. Wise, by Roy St. Lewis, Assistant United States Attorney for the Western District of Oklahoma, and for their answer to complainant's bill, specifically admits each and all of the averments in said bill of complaint contained, except as hereinafter qualified or specifically denied. Such admission is intended to be of the same force and effect as if the averments of the bill were herein repeated at length, save only as the same are herein modified or denied.

1. And the said defendants deny the averments contained in the last paragraph of Section 2 of said bill of complaint, that avers that the right and matter in controversy exceeds, exclusive of interests and costs, the sum and value of Three Thousand Dollars ($3,000.00); and in this behalf, the defendants aver that pursuant to the terms of the Act of March 3, 1921, and the regulations of the Secretary of the Interior, there was available for payment to the said Nicholas Webster, from March 3, 1921, to December 9, 1922, (the date of the filing of this suit), Seven Thousand Dollars ($7,000.00); that during said period of time, Five Thousand Two Hundred Twenty-nine and 62/100 Dollars ($5,229 62) was paid to said Nicholas Webster under supervision, leaving a balance in said account of One Thousand Seven Hundred Seventy and 38/100 Dollars ($1.770.38), which is the amount subject to the controversy under Discussion.

2. And the defendants deny the averments set out in Section 12 of the bill of complaint, that the amount there set out has been wrongfully and unlawfully held by defendants.

3. And the defendants further deny the complainant's income from March 3, 1921 to the time of filing this bill to exceed Twelve Thousand Dollars ($12,000.00) as set out in Section 15 of the complainant's bill.

[fol. 14] 4. And the defendants deny that the averments set out in Section 16 of the complainant's bill that all adult Osage allottees not having certificates of competency are paid the full amount of One Thousand Dollars ($1,000.00) quarterly; and in this behalf, the defendants deny that they are unlawfully, arbitrarily and capriciously withholding any money due the plaintiff.

5. The defendants assert that the complainant Nicholas Webster is a habitual drunkard, and that payments are made intermittantly to said complainant, pursuant to the terms of the Act of March 3, 1921 and the regulations of the Secretary of the Interior and such regulations under and by virtue of authority existing by an Act of Congress known as Section 2087 Revised Statutes.

6. Said refusal to make entire payments was not made arbitrarily nor with any view of depriving complainant herein of his legal rights, but only of defendant's desire to make due compliance with the Acts of Congress of the United States of America.

Wherefore, the defendants pray this Court to make such order and decree in the premises as the true intent and meaning of the Acts of Congress of the United States and the regulations of the Secretary of the Interior may require. If the Court shall find and determine that said laws and regulations are in full force and effect, that the Court shall give judgment dismissing complainant's bill and the defendants ask this Honorable Court to grant such other and further relief as shall be just and equitable.

Roy St. Lewis, Assistant United States Attorney.

[fol. 15] UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

Roy St. Lewis, being first duly sworn, deposes and says, that he has read the above answer and that the things set out therein are true, as he verily believes.

Roy St. Lewis.

Subscribed and sworn to before me, this 16 day of April, A. D. 1923. Edward H. Lewis, Deputy Clerk U. S. Dist. Court. (Seal of the Court.)

[File endorsement omitted.]

[fol. 16] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

DECREE—Filed May 17, 1923

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the petition of the plaintiff be dismissed for want of equity, and upon the merits of the suit; and, that the plaintiff pay the costs by him made in this behalf.

To which decree of the court and every part thereof, the plaintiff excepted, and his exceptions were by the court allowed, and the plaintiff on the day this decree was rendered, and immediately ther-after, and in open court, gave notice of, and prayed an appeal from said decree to the Supreme Court of the United States, which appeal was by the court allowed in open court, upon the giving by the plaintiff of a bond conditioned as provided by law, and in the sum of Five Hundred Dollars.

Dated May 17th, 1923.

John H. Cotteral, District Judge.

[File endorsement omitted.]

[fol. 17] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

STATEMENT OF EVIDENCE—Filed July 31, 1923

It is hereby agreed by counsel for Nicholas Webster, plaintiff, and for J. George Wright and George N. Wise, Defendants, that the following is a correct statement of the evidence in condensed form as it was adduced on the hearing of the above entitled cause:

1. The petition of the plaintiff was introduced without objection.

2. That during a part of the month of July, 1922, the defendants J. George Wright, Superintendent, and George N. Wise, Disbursing Agent, had under their charge and control $3,030.00 of the moneys belonging to the Plaintiff, Nicholas Webster, due the said plaintiff from the $1,000 payments, quarterly, provided for in section 4 of the Act of March 3, 1921, and that said money would have been paid to the said plaintiff, except for the fact that the said plaintiff drinks intoxicating liquors, which were within convenient reach of the plaintiff, and the plaintiff was being carried by the defendants

on a "drunk list" carried as part of the records of the Osage Indian Agency; that at the time this suit was instituted by the plaintiff in December, 1922, there was due to the plaintiff from the defendants, from the source aforesaid, $1,770.38, and that another payment of $1,000 was available on the 18th day of December, 1922; that during the period from March 3, 1921 to December 9th, 1922, the date this suit was instituted, the total income of the plaintiff carried on the books and records of the defendants was in excess of $20,000, and that the defendants at all times had available moneys of the plaintiff to pay the $1,000 quarterly, provided for in the Act of March 3, 1921, and that said payments provided for in the Act of March 3, [fol. 18] 1921, would have been made to the plaintiff by the defendants, J. George Wright, Superintendent, and George N. Wise, Disbursing Agent, except for Section 2087 of the Revised Laws of the United States, and regulations issued to carry into effect said section; that the plaintiff is a full-blood member and allottee of the Osage tribe of Indians, and without a certificate of competency provided for in the Act of June 28, 1906, allotting the Osages.

It is agreed by counsel that the evidence set forth in the two paragraphs marked "1" and "2" is a full and complete statement of the material evidence adduced; that this agreement is for the purpose of reducing the record, and that the same may be used by the Supreme Court of the United States in their consideration of this case on appeal.

Preston A. Shinn, Solicitor for Plaintiff. Roy St. Lewis, Asst. United States Attorney and Solicitor for Defendants J. George Wright and George N. Wise.

IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE—Filed July 31, 1923

Approved, this 31st day of July, 1923, and ordered to be filed by the Clerk of this Court as a true and complete statement in condensed form of the evidence adduced on the hearing of the above entitled cause, and that the same be made a part of the record on appeal.

John H. Cotteral, District Judge.

[File endorsement omitted.]

[fol. 19] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed July 28, 1923

To the Honorable John H. Cotteral, United States Judge for the Western District of Oklahoma:

The above named plaintiff feeling aggrieved by the decree made and entered in the above entitled suit on the 17th day of May, 1923, does hearby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and the said plaintiff, Nicholas Webster, prays that an appeal be allowed, and that citation issue as provided by law; that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner further prays that the proper order touching the security to be required of him to perfect this appeal be made.

Preston A. Shinn, Solicitor for Plaintiff.

The foregoing prayer for an appeal is hereby granted and an appeal allowed said plaintiff, upon the giving by him of a bond conditioned as required by law, and in the sum of Five Hundred Dollars.

John H. Cotteral, Judge of the United States District Court for the Western District of Oklahoma.

[File endorsement omitted.]

[fol. 20] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 28, 1923

Now on this 29th day of July, 1923, comes the above named plaintiff, by his solicitor, Preston A. Shinn, and says that the decree in the above entitled suit made and entered on the 17th day of May, 1923, against the plaintiff and in favor of the defendants, is erroneous and unjust to the plaintiff, and for the following reasons:

1. The court erred in finding the issues in favor of the defendants.

2. The court erred in rendering a decree in favor of the defendants and against the plaintiff.

3. The court erred in holding that Section 2087 of the Revised Statutes of the United States is a valid law in so far as said section was intended to apply to this plaintiff on the 3rd day of March, 1921, or at any time thereafter.

4. The court erred in holding that the acts of the defendants in withholding the moneys mentioned in plaintiff's petition, did not violate the Constitutional rights of the plaintiff, as preserved and protected by the 5th Amendment to the Constitution of the United States.

5. The court erred in holding that the acts and conduct of the defendants, in withholding the moneys and funds belonging to the plaintiff, did not deprive the plaintiff of his property without due process of law as guaranteed in the 5th Amendment to the Constitution of the United States.

[fol. 21] 6. The court erred in holding that the acts and conduct of the defendants, in withholding the moneys and funds belonging to the plaintiff, did not deprive the plaintiff of his liberty without due process of law as guaranteed in the 5th Amendment to the Constitution of the United States.

7. The court erred in holding that section 2087 of the Revised Laws of the United States, or the rules and regulations issued by the Secretary of the Interior of the United States, under authority of said Section 2087, and enforced by the defendants against this plaintiff, did not deprive the plaintiff of his property and his liberty in violation of the 5th Amendment to the Constitution of the United States.

8. The court erred in not holding that Section 2087 of the Revised Laws of the United States, if applied to this plaintiff, and all rules and regulations issued for its enforcement, if applied to this plaintiff, and the acts, conduct, and refusal of the defendant officers of the United States in enforcing said Section 2087 and said rules and regulations, and in withholding the moneys and property of this plaintiff from the plaintiff, were in violation of the 5th Amendment to the Constitution of the United States.

9. The court erred in holding that Section 2087 of the Revised Laws of the United States, and the rules and regulations issued thereunder, were within the authority granted by the people in the Commerce Clause, or any other section or clause, of the Constitution of the United States.

10. The court erred in refusing to issue the injunction prayed for in the petition of the plaintiff.

Wherefore, the plaintiff prays that the said decree be reversed, and the District Court directed to issue said injunction against the defendants, as prayed for in the petition of the plaintiff, and that the

plaintiff may have all other relief which to the court may seem just and proper, the premises considered.

Preston A. Shinn, Solicitor for Plaintiff.

[File endorsement omitted.]

[fol. 22] Bond on Appeal—Filed July 28, 1923 [for $500; approved, Cotteral, J.; omitted in printing]

[fol. 23] In the District Court of the United States for the Western District of Oklahoma

[Title omitted]

Præcipe for Transcript—Filed Aug. 7, 1923

To the above-named defendants and their attorney of record:

In the above entitled cause, the appellant gives notice of his intention to take and file the transcript of the record herein in the Supreme Court of the United States, to be printed under the supervision of its clerk and under its rules. And the appellant hereby designates the following parts and instruments of the record in said cause to be included in said transcript:

1. The complaint, including caption.

2. Motion of defendants Wright and Wise to dismiss, without caption.

3. Answer of defendants, without caption.

4. Decree of the court.

5. Statement of the evidence, without caption.

6. All papers filed after decree rendered looking towards an appeal, including this designation of transcript.

Nicholas Webster, By Preston A. Shinn, His Solicitor.

I hereby accept service of the above and foregoing notice, this 28th day of July, 1923, and acknowledge receipt of a copy thereof.

Roy St. Lewis, Asst. United States Attorney and Attorney for Defendants W-ight and Wise.

[File endorsement omitted.]

[fol. 24] CLERK'S CERTIFICATE TO TRANSCRIPT

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Harry L. Finley, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the above and foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court, in case No. 566, in Equity, wherein Nicholas Webster, is complainant, and Albert B. Fall, Secretary of the Interior of the United States; J. George Wright, Superintendent of the Osage Agency; and, George N. Wise, Special Disbursing Agent, are defendants, as full, true and complete as the said transcript purports to contain and as called for by the designation and stipulation of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Guthrie, in said District, this 7th day of August, A. D. 1923.

Harry L. Finley, Clerk, By Theodore M. Filson, Deputy Clerk. (Seal of the United States District Court, Western District of Oklahoma.)

Endorsed on cover: File No. 29,808. W. Oklahoma D. C. U. S. Term No. 498. Nicholas Webster, appellant, vs. Albert B. Fall, Secretary of the Interior; J. George Wright, Superintendent of the Osage Agency, et al. Filed August 13th, 1923. File No. 29,808.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 149.

NICHOLAS WEBSTER, *Appellant,*

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, J. GEORGE WRIGHT, SUPERINTENDENT OF OSAGE AGENCY, *ET AL.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF *for* APPELLANT.

Statement.

This appeal comes direct to this court under section 238 of the Judicial Code, and on the ground that constitutional questions are involved. The appellant herein filed his bill in equity in the District Court of the United States for the Western District of Oklahoma, on the 9th day of December, 1922, alleging that he was a citizen of the United States, and a member of the Osage Tribe of Indians, living in

Osage County, Oklahoma, in said court district; that he is on the Osage Roll as number 184, and entitled to the rights of an enrolled Osage; that the appellee, Albert B. Fall, as Secretary of the Interior, is in charge of the Osage Indian Agency, acting by and through the appellees, J. George Wright, as Superintendent of the Agency, and Geo. N. Wise, as Special Disbursing Agent for the United States, whose duty it is to pay and disburse the moneys due individual Osages under the laws and authority of the United States; that the appellees, Wright and Wise, were residents of Osage County, Oklahoma, within said court district (R. 2).

This suit is brought to enjoin the appellees, and each of them, from enforcing against the appellant section 2087 of the Revised Statutes of the United States, as well as all orders, regulations and rules, promulgated to carry said section 2087 into effect, and against the appellant, for the reason that the same takes the property and liberty of the appellant without due process of law, and in violation of the 5th Amendment to the Constitution.

The bill alleges that the appellee, J. Geo. Wright, as Superintendent is in charge of the local Osage Agency, and that the appellee, Geo. N. Wise, as Special Disbursing Agent, has a legal duty to perform in paying the appellant and others; that at all times mentioned in the bill the said appellees have sufficient and plenty of funds to make the quar-

terly payments to the appellant, but that the appellees refused to pay the moneys required by the law to be made to the appellant. The bill then set forth the fact that the Osage Tribe of Indians bought and paid for their lands in Oklahoma, out of funds received for the sale of their lands in the State of Kansas; that by the Act of June 28, 1906, the tribal property was divided among the members of the tribe, and that the appellant received thereby a vested property interest in some of the property formerly belonging to the Osage Tribe (R. 3 and 4). That deeds in fee simple were issued to the appellant; that under the Act of June 28, 1906, the appellant had segregated to him in the Treasury of the United States the sum of $3,819.00, which draws interest at the rate of five per centum per annum, same to be paid quarterly to appellant; that said act vested in the appellant a right to receive his pro rata share of the income received by the Osages from oil and gas leases, and that upon the death of the appellant his property, formerly owned by the Osage Tribe of Indians, passed by the act to the heirs of the appellant, and not to the tribe; that the appellant had inherited a one-half interest in the estate of his deceased wife, who was also an allottee of the Osage Tribe; that at all times mentioned in the bill the appellees had ample funds belonging to the appellant to make the payments required by law, and that the same were subject to the command, disposal, check,

and warrant of the appellees, Wright and Wise; that by an Act of March 3, 1921, they were required to pay the appellant the sum of $1,000 quarterly, but that the appellees, Wright and Wise, and each of them, had unlawfully, arbitrarily, and capriciously, withheld such $1,000 payment from the appellant, and had failed and refused to pay the same during the following quarter after the regularly quarterly payment to the Osages, until in July, 1922, there was due and unpaid by virtue of the Act of March 3, 1921, in excess of $3,000.00, which sum had been unlawfully, arbitrarily and capriciously held by said appellees; that there had been a regularly quarterly payment made in September, 1922, and would be another quarterly payment in December of the same year, and other and many quarterly payments to follow until the year of 1946; that the appellant was forty-seven years of age, and in good health, of sound body, and in the natural course of men of his age and physical condition he should live many years in which to receive and enjoy the income to be paid to him quarterly under the Act of March 3, 1921 (R. 4, 5 and 6).

That the appellees, Wright and Wise, were refusing to pay the income due the appellant, because of section 2087 of the Revised Statutes of the United States, and the rules and regulations issued under and by virtue of authority supposed to be and exist in said section 2087; that the section 2087, and all

rules and regulations issued for the enforcement of the same, insofar as said section was intended to apply to the appellant, were in contravention of the 5th Amendment to the Constitution of the United States, and therefore void, for the reason that said section 2087, and the rules and regulations issued thereunder, and the unlawful and capricious acts of the appellees, deprives the appellant of his property and liberty without due process of law.

The appellant prayed for the writ of injunction against the appellees to restrain them from enforcing said section 2087, and the rules, regulations, and all unlawful, arbitrary and capricious acts of the appellees, which deprive the appellant of his property and liberty without due process of law, and that said section 2087, the rules and regulations issued thereunder, and the unlawful, arbitrary, and capricious acts, be adjudged to violate the Constitution of the United States; and, that the appellees be enjoined from refusing to pay to the appellant the $1,000.00 quarterly, as required by the Act of March 3, 1921 (R. 7 and 8).

Service was had on the appellees, J. Geo. Wright and Geo. N. Wise, but not on Albert B. Fall. The appellees, Wright and Wise, answered (R. 9 and 10), admitting the allegations of the bill, except as thereinafter denied or qualified. They denied that the right and controversy involved, exclusive of interest and costs, was of the value of $3,000, claiming that

the amount involved was but $1,770.38; they denied that the money was being held wrongfully, unlawfully, and capriciously; they admitted that they were holding the money due the appellant because of section 2087 of the Revised Statutes of the United States, and because of regulations issued by the Secretary of the Interior under authority of said section 2087. Evidence was adduced at the hearing on bill and answer (R. 11), and the court rendered a decree in favor of the appellees and against this appellant (R. 11), dismissing the bill for want of equity, and upon the merits of the suit. An appeal to this court was allowed.

Evidence.

The court approved a reduced statement of the evidence (R. 11 and 12), from which we find:

> "The petition of the plaintiff was introduced without objection.
>
> "That during a part of the month of July, 1922, the defendants, J. George Wright, Superintendent, and Geo. N. Wise, Disbursing Agent, had under their charge and control $3,030.00 of the moneys belonging to the plaintiff, Nicholas Webster, due the said plaintiff from the $1,000 payments, quarterly, provided for in section 4 of the Act of March 3, 1921, and that said money would have been paid to the said plaintiff, except for the fact that the said plaintiff drinks intoxicating liquors, which were within covenient reach of the plaintiff, and the plaintiff was

being carried by the defendants on a 'drunk list' carried as part of the records of the Osage Agency; that at the time this suit was instituted by the plaintiff in December, 1922, there was due to the plaintiff from the defendants, from the source aforesaid, $1,770.38, and that another payment of $1,000 was available on the 18th day of December, 1922; that during the period from March 3, 1921, to December 9th, 1922, the date this suit was instituted, the total income of the plaintiff carried on the books and records of the defendants was in excess of $20,000, and that the defendants at all times had available moneys of the plaintiff to pay the $1,000 quarterly, provided for in the Act of March 3, 1921, and that said payments provided for in the Act of March 3, 1921, would have been made to the plaintiff by the defendants, J. George Wright, Superintendent, and George N. Wise, Disbursing Agent, except for section 2087 of the Revised Laws of the United States, and regulations issued to carry into effect said section; that the plaintiff is a full-blood member and allottee of the Osage Tribe of Indians, and without a certificate of competency provided for in the Act of June 28, 1906, allotting the Osages" (R. 11 and 12).

ASSIGNMENT *of* ERRORS.

Now on this 29th day of July, 1923, comes the above named plaintiff, by his solicitor, Preston A. Shinn, and says that the decree in the above entitled suit made and entered on the 17th day of May, 1923, against the plaintiff and in favor of the defendants, is erroneous and unjust to the plaintiff, and for the following reasons:

1. The court erred in finding the issues in favor of the defendants.

2. The court erred in rendering a decree in favor of the defendants and against the plaintiff.

3. The court erred in holding that section 2087 of the Revised Statutes of the United States is a valid law insofar as said section was intended to apply to this plaintiff on the 3rd day of March, 1921, or at any time thereafter.

4. The court erred in holding that the acts of the defendants in withholding the moneys mentioned in plaintiff's petition, did not violate the constitutional rights of the plaintiff, as preserved and protected by the 5th Amendment to the Constitution of the United States.

5. The court erred in holding that the acts and conduct of the defendants, in withholding the moneys and funds belonging to the plaintiff, did not de-

prive the plaintiff of his property without due process of law as guaranteed in the 5th Amendment to the Constitution of the United States.

6. The court erred in holding that the acts and conduct of the defendants, in withholding the moneys and funds belonging to the plaintiff, did not deprive the plaintiff of his liberty without due process of law as guaranteed in the 5th Amendment to the Constitution of the United States.

7. The court erred in holding that section 2087 of the Revised Laws of the United States, or the rules and regulations issued by the Secretary of the Interior of the United States, under authority of said section 2087, and enforced by the defendants against this plaintiff, did not deprive the plaintiff of his property and his liberty in violation of the 5th Amendment to the Constitution of the United States.

8. The court erred in not holding that section 2087 of the Revised Laws of the United States, if applied to this plaintiff, and all rules and regulations issued for its enforcement, if applied to this plaintiff, and the acts, conduct, and refusal of the defendant officers of the United States in enforcing said section 2087 and said rules and regulations, and in withholding the moneys and property of this plaintiff from the plaintiff, were in violation of the 5th Amendment to the Constitution of the United States.

9. The court erred in holding that section 2087 of the Revised Laws of the United States, and the rules and regulations issued thereunder, were within the authority granted by the people in the Commerce Clause, or any other section or clause, of the Constitution of the United States.

10. The court erred in refusing to issue the injunction prayed for in the petition of the plaintiff.

Wherefore, the plaintiff prays that the said decree be reversed, and the District Court directed to issue said injunction against the defendants, as prayed for in the petition of the plaintiff, and that the plaintiff may have all other relief which to the court may seem just and proper, the premises considered.

ARGUMENT.

The property and money involved belongs to Webster, and any law or regulation, or arbitrary act by federal officials in charge thereof, that would deprive Webster of his property, without notice and hearing, is in violation of the 5th Amendment to the Federal Constitution.

Under treaty of September, 1865, the Osages conveyed their lands in the State of Kansas to the United States, as trustees for the purpose of sale, and from the sales made there was placed in the Treasury of the United States something over $8,000,000.00 to the credit of the Osage Tribe of Indians. From the sales of those lands there was used something over $1,000,000.00 in the purchase of the Osage lands in Oklahoma. The moneys placed in the Treasury drew interest at the rate of five per centum per annum, payable to the tribe as a tribe, and not to the individual member *(Stewart* v. *Osage Tribe,* 206 U. S. 192). By the Act of June 28, 1906 (34 Stat. 539), Congress provided for the allotment of the Oklahoma lands to the individual members of the tribe, after having provided for an official roll of membership, and issued to the members deeds in fee simple, with restrictions against alienation, unless a certificate of competency was issued upon the application of the individual member (seventh paragraph of Sec. 2). The certificate of competency had

to do only with the surplus allotted lands of the individual, giving the right to "manage, control, and dispose" thereof. Section 4 of the act provided that the moneys held by the United States for the Osage Tribe, should be *segregated* and "placed to the credit of the individual members of said Osage Tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, *or to their heirs* as hereinafter provided, said credit to draw interest as now authorized by law, and the interest that may accrue thereon *shall be paid quarterly to the members entitled thereto*" (italics by counsel).

Section 4, further provided, "that the royalty received from oil, gas, coal and other mineral leases * * *, shall be placed in the Treasury of the United States to *the credit of the members of the Osage Tribe* of Indians as *other moneys* of said tribe are to be deposited under the provisions of this act, *and the same shall be distributed to the individual members* of said tribe according to the roll provided for herein, *in the manner and at the same time* that payments are made of interest on other moneys held in trust for the Osages" (italics by counsel).

Section 6 provides, "that the lands, moneys, *and mineral interests, herein provided for,* of any deceased member of the Osage Tribe shall descend to his or her *legal heirs,* according to the laws of," what is now Oklahoma (italics by counsel).

On April 18, 1912, there was approved an Act supplementing and amending the Act of June 28, 1906, which will be referred to later. This appellant drew his entire income provided for in the Act of 1906, until in March, 1921, Congress further spoke on the subject. By the Act of March 3, 1921 (41 Stat. 1249), and in section 4 thereof, Congress provided:

> "That from and after the passage of this act the Secretary of the Interior shall cause to be paid *at the end of each fiscal* quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe *or heir* of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, *and so long as the income is sufficient* to pay to the adult members of said tribe not having a certificate of competency $1,000 *quarterly* except where incompetent adult members have legal guardians, in which case the income of such incompetent shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minors *all* of said *quarterly payments* to legal guardians *and adults, not having certificates of competency* to be paid under the supervision of the Superintendent of the Osage Agency * * *" (italics by counsel).

The appellant herein is without a certificate of competency, and under the foregoing section Con-

gress said he was to receive $1,000 "quarterly." True, under this section he was to receive same to be paid under the supervision of the Superintendent, but he is to receive it all, and not a part. The section says that those with certificates are to receive their entire income, and not under supervision, but that Webster is to receive $1,000. Not the amount the Superintendent thinks he should have, but $1,000. The Superintendent may supervise, and pay the amount in full at one payment, or make partial payments of same, but at the close of the "quarter" following the payments to those having certificates, if the entire amount of $1,000 has not been paid to Webster, he is entitled under the act to receive all the balance. The act says that *"all of said quarterly payments"* are to be paid "under the supervision of the Superintendent." The first part of the section says that "the Secretary of the Interior *shall cause* to be paid at the end of each fiscal quarter * * *, *and so long as* the income is sufficient" to pay Webster *"$1,000 quarterly."* The record in this case shows that at the time the appellant instituted this suit the defendants had of his funds "in excess of $20,000, and that the defendants at all times had available moneys of the plaintiff to pay the $1,000 quarterly, provided for in the Act of March 3, 1921" (R. 12). These quarterly payments are made in March, June, September, and December, of each year. The record shows that in July, 1922, the defendants were hold-

ing $3,030 of the appellant's moneys due from these quarterly payments of $1,000, although the Act of 1921, had only been in effect about fifteen months, and there was due him on the day the suit was brought, December 9, 1922, $1,770.38, with another payment due in nine days, or $2,770.38.

The bill alleged and the answer admitted that these moneys were not paid to the appellant because of section 2087 of the Revised Laws of the United States, and the rules and regulations of the Secretary. On March 3, 1847, Congress passed an act (9 Stat. 203), section 3 of which act, with a few minor changes, was carried in the revision of 1873, into the Revised Laws in two sections, 2086, 2087, as follows:

> "*2086.* The payment of all moneys and the distribution of all goods stipulated to be furnished to any Indians, or tribe of Indians, *shall be made in one of the following ways, as the President or the Secretary of the Interior may direct:*
>
> "*First. To the chiefs of a tribe, for the tribe.*
>
> "*Second.* In cases where the imperious interest of the tribe or the individuals intended to be benefited, or any treaty stipulation, requires the intervention of an agency, *then to such person as the tribe* shall appoint to receive such moneys or goods; or if several persons be appointed, then upon the joint order or receipt of such persons.

"*Third.* To the heads of families and to the individuals entitled to participate in the moneys or goods.

"*Fourth.* By consent of the tribe, such moneys or goods may be applied directly, under such regulations, not inconsistent with treaty stipulations, as may be prescribed by the Secretary of the Interior, to such purposes as will best promote the happiness and prosperity of the members of the tribe, *and will encourage able bodied Indians in the habits of industry and peace.*"

"*2087.* No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquors, *nor while there are good and sufficient reasons leading the officers or agents,* whose duty it may be to make such payments or distribution, *to believe that there is any species of intoxicating liquor within convenient reach of the Indians, nor until the chiefs and headmen of the tribe shall have pledged themselves to use all their influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country*" (italics by counsel).

In arriving at the meaning of section 2087, this court will also look to section 2086, as they were formerly one section. See, *Buck Stove & Range Co.,* v. *Vickers,* 226 U. S. 205, 213; *Hyde* v. *U. S.,* 225 U. S. 360, 361; *Anderson* v. *Pacific Coast Steamship Co.,* 225 U. S. 187, 189.

The Act of April 18, 1912 (37 Stat. 86), is entitled "An Act supplementary to and amendatory of the act entitled 'An act for the division of the lands and funds of the Osage Nation of Indians in Oklahoma,' approved June twenty-eighth, nineteen hundred and six, and for other purposes." The 1912 Act supplementing the 1906 Act, recognizes "individual property" throughout the act. It provides for the paying out of the funds held in trust (Sec. 5); for the partition of individual allotments of deceased Indians (Sec. 6); for the conveying of "any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will" (Sec. 8), and, provides in section 11, *"that all acts or parts of acts inconsistent herewith be, and the same hereby are, repealed."*

The Acts of 1906 and 1912 have to do with individual vested property, while section 2087 of the Revised Laws has to do with tribal property. The Osage Acts are complete in themselves, and they provide for the paying out of funds, with nothing said as to intoxicating liquors. The section 2087 was for the purpose of paying out funds and goods *of the United States* to the Indians, and was not intended to apply to cases where the United States was paying out individual vested moneys to Indians. We submit that section 2087, insofar as the appellant is concerned, was repealed by the Acts of 1906 and 1912.

Section 2086 provides that all moneys shall be paid "as the President or the Secretary of the Interior may direct." But Congress, by the Acts of 1906 and 1912, *supra,* have directed otherwise.

Under section 2086 payment may be made to the chiefs of the tribe for the tribe. But under the Acts of 1906 and 1912 the moneys must be paid to the *individual Osage, or his heirs.*

Under section 2086 payments may be made to such person as the *tribe may appoint.* But under the Act of 1906 the tribe has no interest in money due an individual Osage.

Under section 2086, by consent of the tribe and the Secretary of the Interior, payment may be diverted to purposes tending to promote their happiness and prosperity, "and encourage able bodied Indians in the habits of industry and peace." Under the Act of 1906 neither the tribe nor Secretary can divert the moneys vested in the individual Osages. And being citizens of the United States, they are a peaceful, civilized people.

The method of payment of "all moneys" to Indians having been prescribed by section 2086, the following section 2087, which also relates to Indians generally, provides that "no moneys shall be paid" thereunder, where any of the following conditions exist:

1. *While they are under the influence of liquor.* But the Act of 1906 authorizes the withholding of

payment for but one cause only, *viz.*, the squandering by a parent of a minor's money.

2. *Where there are good and sufficient reasons to believe that there is intoxicating liquor within convenient reach.* But the Act of 1906 commands that payments *shall be made quarterly,* and that duty cannot be defeated by the presence, or suspected presence, of a bootlegger in the vicinity. Section 2087 leaves the definition of "convenient reach" to the officer making the payment. We now have a twelve-mile limit fixed by treaty with England, but the officer may think that distance too convenient.

3. *Nor until the chiefs and headmen of the tribe shall have pledged themselves to use all their influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country.* The Osages have no region which can be designated "their country," as their former reservation is now Osage County, Oklahoma, and it is the duty of the governments, federal and state, to enforce the laws in that county. There are no longer any chiefs and headmen in the sense in which that term is used in section 2087. The chief and the Osage Council have but one duty to perform, and that is the leasing of oil and gas lands for their "shareholders."

Section 2087 makes no attempt to provide for notice and hearing, but only for the suspicion of the officer making the payment. The local Indian Agency have a few "Indian Constables" or farmers, and

if one of these men reports adversely, or for some reason does not like some particular individual, the Indian may find himself on a *"drunk list,"* and this without notice or hearing. Justice MATTHEWS must have had the future in mind, when he said, for this court:

> "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, *as being the essence of slavery itself.*"
>
> —*Yick Wo* v. *Hopkins,* 118 U. S. 356, 374;
>
> *Truax* v. *Corrigan,* 257 U. S. 331.

The law must provide within its words for due process, and not leave that right to the caprice and whims of others. In *Coe* v. *Armour Fert. Works,* 237 U. S. 424, 425, this court said:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same results because he had no adequate defense upon the merits. *Rees* v. *Watertown,* 19 Wall. 107, 123."

See also *L. & N. Ry. Co.* v. *Central Stock Yards Co.,* 212 U. S. 132, 144.

If section 2087, when applied to the appellant, is unconstitutional; if the section has been repealed as to the Osages; or, if the appellees insisting that

they have the authority, under the section, but are transcending its bounds, and unlawfully assuming to exercise the power of government against the appellant, thereby depriving him of his property without due process of law, the injunction should issue. See *American School* v. *McAnnulty*, 187 U. S. 94; *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 172; *Philadelphia Co.* v. *Stimson*, 223 U. S. 619, 622; *Lane* v. *Hogland*, 244 U. S. 181; *Waite* v. *Macey*, 246 U. S. 606, 607; *John Hill, Jr.*, v. *Wallace, et al.*, 259 U. S. 60, 72; *Garfield* v. *Goldsby*, 211 U. S. 261.

In *Philadelphia Co.* v. *Stimson, supra*, this court, speaking through Mr. Justice HUGHES, said:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded * * *. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments * * *. And it is *equally applicable to a* federal officer acting *in excess of his authority or under an authority not* validly conferred" (italics by counsel).

And further:

> "It is urged that the statute authorizing the

Secretary of War to prevent encroachments upon navigable streams is a valid one, and that the decisions cited do not apply. The validity of the statute is not attacked, because of the assumption that it is not to be construed to contemplate or authorize the alleged deprivation of property. Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner,* is guilty of an invasion of private property" (italics by counsel).

Where the rules and regulations issued by the Secretary of the Interior and under which the appellees, Wright and Wise, are withholding the funds from the appellant are void, they are acting without authority, and it is not necessary to get service on the Secretary. *American School* v. *McAnnulty,* 187 U. S. 97; *John Hill, Jr.,* v. *Wallace, et al.,* 259 U. S. 44, 72.

A law may be valid when enacted, and later become invalid. Also, it may be valid as to some and void as to others. See *Galveston Electric Co.* v. *Gal-*

veston, 258 U. S. 400, 401; *Hamilton* v. *Kentucky Distil.,* 251 U. S. 162; *Dahnke-Walker* v. *Bondurant,* 257 U. S. 289.

Indians and their property are protected by the provisions contained in the 5th Amendment to the Federal Constitution. See *Choate* v. *Trapp,* 224 U. S. 665, 679; *Ward* v. *Love County,* 253 U. S. 19, 20; *Jones* v. *Meehan,* 175 U. S. 1.

Jurisdiction.

This record shows that in July, prior to the bringing of this suit by Webster in December, the appellees were holding $3,030 due the appellant; that at the time the suit was instituted they owed him the sum of $1,770.38, with another quarterly payment due within a few days; that his total income from March 3, 1921, to December 9, 1922, was in excess of $20,000 (R. 11 and 12). It is admitted by the answer that the appellant was at that time forty-seven years of age, and in good health, and that these quarterly payments to the appellant would probably continue until 1946, the date when the mineral reservation terminates; that the appellant would in the natural course of events live for many years yet to come. The appellees had at one time held in excess of the jurisdictional amount from appellant. If they have the authority to withhold these funds, then as a matter of law they do not need to stop with $3,030.00, but can withhold each and every payment from the

appellant. Since the date of hearing there has been added to the $20,000 as much as $15,000 in addition. Should the amount never grow larger, but income into the hands of the appellees for the appellant would cease, there would be at least $30,000 to be paid out to appellant in quarterly payments of $1,000 each. If they have the authority the appellees can hold every cent of that amount from the appellant, and this without notice and hearing of any character. The amount involved to the appellant is greatly in excess of the jurisdictional amount. See *Scott* v. *Donald*, 165 U. S. 107, 117; *Bitterman* v. *Louisville & N. Ry. Co.*, 207 U. S. 225; *Glenwood Light Co.* v. *Mutual Light Co.*, 239 U. S. 125; *Western & Atlantic Ry.* v. *Railroad Com.*, 261 U. S. 264, 266.

In *Scott* v. *Donald, supra*, this court said:

> "A controversy exceeding the value of $2,000 is presented in a suit for an injunction, where complainant intends to import certain liquors exceeding $2,000 in value, and defendants have seized some thus imported, and threatened to seize all that he shall import, *under an unconstitutional statute*" (italics by counsel).

We respectfully submit that the section 2087, and the rules and regulations issued thereunder, insofar as they are intended to apply to the appellant, are in violation of his rights under the 5th Amendment to the Federal Constitution; that the acts and conduct of the appellees in withholding the payments

from the appellant are arbitrary and capricious, and in violation of his rights under the 5th Amendment to the Federal Constitution, and that the District Court for the Western District of Oklahoma should have issued the injunction as prayed for. We respectfully pray a reversal of said decree, and that that court be instructed by this court to issue said injunction.

Respectfully submitted,

PRESTON A. SHINN,
Attorney for Appellant.

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In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1924.

No. 149.

NICHOLAS WEBSTER, - - - - - *Appellant,*

versus

ALBERT B. FALL, Secretary of the Interior; J. GEORGE WRIGHT, Superintendent of the Osage Agency, *et al.*, - - - - - *Appellees.*

On Appeal from the District Court of the United States for the Western District of Oklahoma.

REPLY BRIEF OF APPELLANT.

The brief of appellees suggests that the Secretary of the Interior is a necessary party to this suit, and that the same should be dismissed by this Court. They rely upon *Gnerich* v. *Rutter*, 265 U. S. 388, and *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28.

We think neither of these cases in point in this case. This case, as shown by the complaint, was brought to enjoin the appellees from enforcing Sec-

tion 2087 of the Revised Statutes of the United States, and all Rules and Regulations issued under that section, and all unlawful, arbitrary and capricious acts of the appellees, as against this appellant, which deprives the appellant of his property and liberty without due process of law, and in violation of the Fifth Amendment to the Constitution of the United States. The Secretary of the Interior was made a party to the suit, but as he was not within the jurisdiction of the court it was not possible to obtain jurisdiction over him. He could have plead in the suit, but did not. The other defendants to the suit filed their motion to dismiss, but not on the ground that the Secretary had not entered his appearance. (Rec., p. 9.) Nor did their answer take any exceptions to the fact that the Secretary had not entered his appearance, or that service was not had upon him. Under many of the decisions of this Court if the acts of the appellees deprived the appellant of his property without due process of law and in violation of the Fifth Amendment, they could not justify their acts because of instructions from their superior officer. Also the Act of March 3, 1921, gave the appellee, Superintendent of the Osage Agency, a duty to perform independent of the Secretary of the Interior, when it required that the $1,000.00 *quarterly* should be paid "under the supervision of the Superintendent of the Osage Agency". The Superintendent alone was charged with the duty of "supervision".

For more than twenty years this Court has recognized the right, under the circumstances in this case, of a party to enjoin the deprivation of property in violation of the Fifth Amendment, and without making the superior of the party restrained a party to the suit. If the Fifth Amendment is to serve the purpose for which it was adopted there will be no deviation from this rule long established. If Federal officials, by the thousands, can be permitted to deprive persons, under the guise of authority, of their property and liberty without the due process of law required, and they are to have no relief without a suit in the District of Columbia, where they can get service upon the superior officer of the defendant to be charged, then due process of law as required of the United States means nothing to more than 100,000,000 people of the United States, who cannot pay the expense of a trip across the country to Washington, and expensive litigation.

The case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 101, was a suit against a postmaster, without making the Postmaster General a party, to enjoin the postmaster from depriving the plaintiff of his property without due process of law, in enforcing orders and regulations issued by the Postmaster General. The trial court refused the writ, and upon direct appeal to this Court, the case was reversed, in an opinion by Mr. Justice PECKHAM, in which he said:

> "The Postmaster General's order, being the result of a mistaken view of the law, *could not*

operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court." (Italics by counsel.)

In referring to the *McAnnulty* case, in *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 325, Mr. Justice PECKHAM said:

> "In the *McAnnulty* case it was held that the order of the Postmaster General to the postmaster in the City of Nevada, not to deliver the mail to the relator, was not a justification for such refusal, because the order was given without authority of law, and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail. The case has no relevancy to the one in hand."

The suit of *Public Clearing House* v. *Coyne, Postmaster,* 194 U. S. 504, 505, was for an injunction against the postmaster in Chicago. The Postmaster General was not made a party, and this Court took jurisdiction of same on direct appeal. The suit was to protect due process of law, and this Court approvingly cited *American School of Magnetic Healing* v. *McAnnulty, supra.*

The suit of *John Hill* v. *Henry C. Wallace, Secretary of Agriculture, David H. Blair, Commissioner of Internal Revenue, et al.,* 259 U. S. 44, was a suit wherein it was alleged that the *Future Trading Act* deprived the plaintiffs of their property without due process of law in violation of the Fifth Amendment,

and that the *Act* also violated the Tenth Amendment. The suit was, among others, against the Collector of Internal Revenue, and his superior officer, the Commissioner of Internal Revenue. There was no service on the Secretary of Agriculture and the Commissioner of Internal Revenue. Each member of this Court seems to have agreed that the *Act* was unconstitutional, and the Court speaking by Mr. Chief Justice TAFT, said:

> "The injunction against the Board of Trade and its officers, and the injunction against the *collector of internal revenue* and the district attorney, should be granted, so far as $4 is concerned and the regulations of the act interwoven within it. The court below acquired no personal jurisdiction of the Secretary of Agriculture and the *Commissioner of Internal Revenue* by proper service, and the dismissal as to them was right."

The case of the *Board of Trade et al.* v. *Edwin A. Olsen et al.*, 262 U. S. 1, included among others, Arthur C. Lueder, as postmaster, without making the Postmaster General a party thereto. This Court retained jurisdiction over the postmaster, so evidently the Postmaster General was not a necessary party.

In *Regal Drug Corporation* v. *Justus S. Wardell, as United States Collector of Internal Revenue*, 260 U. S. 386, this Court retained the suit, reversed the lower court, and sustained the right of an injunction to prevent the deprivation of property without due process of law. The Commissioner of Internal Rev-

enue was not a party to this suit, although the superior officer of the collector. The Solicitor General, Mr. BECK, was of counsel in that case.

The case of *Waite* v. *Macy*, 246 U. S. 606, was an injunction suit against the Board of Tea Appraisers, designated by the Secretary of the Treasury, and working under his instructions. The Secretary was not made a party to the suit. Mr. Justice HOLMES, wrote the opinion:

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption. * * * Again, it is true that courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. * * * But in this case the *superior of the appellants had promulgated a rule for them to follow* which is alleged to be beyond the powers of the Secretary to make. The Secretary and the board must keep within the statute, which goes to their jurisdiction * * * and we see no reason why the restriction should not be enforced by injunction." (Italics by counsel.)

See also, *Lipke* v. *Lederer, Collector*, 259 U. S. 558; *Corneli* v. *Moore*, 257 U. S. 491; *Nu Fung* v. *White, Commissioner of Immigration*, 259 U. S. 277; *National Life Insurance Company of the United States* v. *National Life Insurance Company, Fred A. Busse, Post-*

master, 209 U. S. 317. And, *Lewis Publishing Company* v. *Morgan, as Postmaster*, 229 U. S. 288, wherein the Postmaster General was not made a party. The opinion was by Mr. Chief Justice WHITE, and Mr. JAMES M. BECK presented the case for the Lewis Publishing Company.

There are many cases in the Federal Reporter wherein the Court entertained the suit for injunction against the local representative of one of the departments, without making the superior officer a party thereto, including the case of *Eastman* v. *Armstrong-Byrd Music Co.*, 212 Fed. 662 (C. C. A.), a suit for injunction against the Postmaster and his assistant, Oklahoma City, to restrain them from enforcing the rules of the Postmaster General, although the Postmaster General was not made a party thereto. See *United States* v. *Lee*, 106 U. S. 197, wherein the President and the Secretary of War had issued orders to one Kaufman, *et al.*, wherein this Court said:

> "Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy *when the citizen has been deprived of his property by force*, his estate seized and converted to the use of the Government without any lawful authority, *without any process of law* and without any compensation, because the President has ordered it and his officers are in possession?

See also, Swigart et al vs. Baker, 229 U. S. 187. See p. 9

"If such be the law of the country, *it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights.*

"The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the Government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations." (Italics by counsel.)

The case of *Gnerich* v. *Rutter*, 265 U. S. 388, obviously is not controlling, as the case did not involve the "construction or application of the Constitution of the United States", nor the "constitutionality of any law of the United States", as the appeal would have been direct to the Supreme Court and not to the Circuit Court of Appeals. *(State of Ohio ex rel. Allen J. Seney* v. *Swift & Company*, 260 U. S. 146.) And the Supreme Court would not have had jurisdiction to hear same on appeal from the Circuit Court of Appeals. By going direct to the Circuit Court of Appeals, Gnerich would have been bound on all questions, and could not have had a second appeal. *Swift* case, *supra.* The reading of the opinion by this Court, and in the 277 Federal 632, seems conclusive, that the case was not such an one as is now before the Court.

The Jurisdiction of the District Court.

In addition to the cases cited in appellant's brief, we would call attention to *Smithers* v. *T. Smith et al.*, 204 U. S. 632; *Hart* v. *B. F. Keith*, 262 U. S. 272.

The Secretary of the Interior can have no interest in an unconstitutional statute. In *Osborn* v. *Bank of United States*, 9 Wheaton 738, Chief Justice MARSHALL said:

> "The counsel for the appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.
>
> "It being, then, shown, we think conclusively, that the defendants could derive neither authority nor protection from the act which they executed, * * * the only real question in the cause is, whether the record contains sufficient matter to justify the court in pronouncing a decree against the defendants."

Respectfully submitted,

PRESTON A. SHINN,
Pawhuska, Oklahoma,
Attorney for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1924

NICHOLAS WEBSTER, APPELLANT
v.
ALBERT B. FALL, SECRETARY OF THE INTERIOR; J. GEORGE WRIGHT, Superintendent of the Osage Agency, et al. } No. 149

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR APPELLEES

STATEMENT

By section 4 of the Act of March 3, 1921, c. 120, 41 Stat. 1249, 1250, Congress provided that the Secretary of the Interior should pay to each adult member of the Osage Tribe, not having a certificate of competency, $1,000 quarterly of the income of such member representing his pro rata share, either as a member or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties under leases.

Nicholas Webster is a member of the Osage Tribe without a certificate of competency.

Because he drank intoxicating liquors "which were within convenient reach," Webster was carried on

a "drunk list," made a part of the records of the Osage Indian Agency. For that reason the officers charged with the duty of making the quarterly payments refused to pay him certain money which otherwise would have been paid to him as income. The ground upon which this refusal was predicated was § 2087, R. S., and the regulations of the Secretary of the Interior thereunder. That section is as follows:

> No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquor, nor while there are good and sufficient reasons leading the officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach of the Indians, nor until the chiefs and headmen of the tribe shall have pledged themselves to use all their influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country.

To compel the payment of the moneys withheld, and to enjoin the enforcement against him of § 2087 and of the regulations, Webster filed this suit in the United States District Court for the western district of Oklahoma, naming as defendants Albert B. Fall, Secretary of the Interior; J. George Wright, Superintendent of the Osage Agency; and George N. Wise, Special Disbursing Agent.

Service was not had on Mr. Fall, but was made on Messrs. Wright and Wise. A motion to dismiss and an answer were filed on behalf of these two (R. 9, 10); the case proceeded to a trial, and a decree was entered dismissing the bill for want of equity and on the merits.

From that decree Webster took a direct appeal to this Court under § 238 of the Judicial Code.

ARGUMENT

I

The Secretary of the Interior a necessary party

With respect to the official status of defendants Wright and Wise the bill of complaint alleges as follows:

> That the defendant J. George Wright is the Superintendent for the United States in charge of the Osage Agency, and resides and receives his mail in Pawhuska, Oklahoma, the seat of the Osage Agency, same being an Indian Agency for and over the Osage Tribe of Indians in Oklahoma, and established by the United States; that the defendant George N. Wise is a Special Disbursing Agent of the United States whose duty is to pay and disburse the funds and moneys due Individual Osages to such individual, the said Wise residing in Pawhuska, Oklahoma, the seat of the Osage Agency. (Par. 1, R. 2.)
>
> That the defendant, J. George Wright, as superintendent of the Osage Agency, is the local representative of the Department of the

> Interior for the Osage Agency and has charge as Superintendent of the Osage Agency and its employees, but under the direction of the Secretary of the Interior, to whom, and his agents and employees, the Superintendent makes his reports as such Superintendent; that as such Superintendent he, in conjunction with the defendant, George N. Wise, is charged with the duty of making the quarterly payments to Osage Allottees. (Par. 3, R. 2.)
>
> That the defendant, George N. Wise, as such Special Disbursing Agent of the United States, is, among other things, charged with the duty of making quarterly requisition on the Treasury Department of the United States, for money with which to make payment to the individual Osage Allottees, and the said George N. Wise does make such quarterly requisitions, and does receive the money with which to make such quarterly payments, and does receive the money with which to pay quarterly this plaintiff, the amount due this plaintiff and other Osage Allottees, but the said George N. Wise and the said J. George Wright fail and refuse to make the quarterly payments to this plaintiff, as required by law, as will be more fully set forth hereinafter. (Par. 4, R. 2, 3.)

These allegations make manifest that Superintendent Wright and Disbursing Agent Wise are subordinates of the Secretary of the Interior. And in fact they are. In the refusal to make the payments to Webster these officers are acting under the "orders, rules, and regulations issued to J. George Wright and

Geo. N. Wise, by the defendant Albert B. Fall, and his predecessors in office." (Par. 17, R. 6.)

According to the statement of the evidence (R. 12) the payments "would have been made to the plaintiff by the defendants, J. George Wright, Superintendent, and George N. Wise, Disbursing Agent, except for section 2087 of the Revised Laws of the United States, and regulations issued to carry into effect said section."

It is clear that the suit should not have proceeded in the absence of the Secretary of the Interior, who was a necessary party. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Gnerich* v. *Rutter*, 265 U. S. 388.

We therefore submit that this court should not pass upon the merits of the case, but, conformably to the procedure followed in the cases cited, should reverse the decree below and direct that the bill be dismissed for want of a necessary party.

II

The jurisdiction of the District Court

The bill avers that the amount in controversy is over $3,000 (par. 2, R. 2), and in paragraph 16, R. 5, 6, it is stated that in July, 1922—

> there was due this plaintiff by virtue of the Act of March 3, 1921, in excess of $3,000, which amount was so unlawfully, arbitrarily, and capriciously withheld by said defendants; that there was a regular quarterly payment made in September of 1922, and a regular

> quarterly payment is to be made in December, 1922, and other and many quarterly payments to follow until the year 1946; that this plaintiff is forty-seven years of age, of sound body, and in the natural course of men of his age and physical condition should live many years in which to receive and enjoy the income to be paid to him at the regular quarterly payments aforesaid.

The answer denied the allegation of paragraph 2 as to the jurisdictional averment, and asserted that at the time of filing of suit there was due to plaintiff $1,770.38 and that this was the amount subject to the "controversy under discussion." (R. 9.)

In the Statement of Evidence the following appears:

> that at the time this suit was instituted by the plaintiff in December, 1922, there was due to the plaintiff from the defendants, from the source aforesaid, $1,770.38. (R. 12.)

Since there was lacking the jurisdictional amount required to maintain a suit of this character in the District Court (§24, par. 1, Judicial Code), the Court should have dismissed the bill for want of jurisdiction. As the question of jurisdiction is fundamental, the appeal itself presents that question to this court. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 194.

To make a case on the point of jurisdiction, appellant argues that because subsequently accruing quarterly payments are withheld and as he will be entitled to others accruing in the future years, the

action of defendants will affect a sum in the aggregate greatly in excess of the jurisdictional amount. (Brief, pp. 23, 24.) But it is conceded that when the suit was instituted $1,770.38 was the amount to which appellant was then entitled. What would become due and payable later was a matter of speculation, and in any event would have no effect in the determination of whether the suit as instituted could be maintained.

Appellant also refers to the fact that his total *income* from March 3, 1921, to December 9, 1922, when suit was filed, was $20,000 and since the case has been heard more than $15,000 have been added to it. We do not see the relevancy of that. Since he is an Osage not having a certificate of competency, the Secretary, under the Act of March 3, 1921, was authorized to pay him quarterly but $1,000 no matter how much more there was available as his pro rata share. (*Work* v. *Lynn*, decided Nov. 17, 1924.)

The cases cited by appellant as supporting his claim that an amount sufficient to sustain jurisdiction was involved, do not cover his case. In them there was averment or evidence that the business or right sought to be protected or vindicated was of a value in excess of the jurisdictional amount. In the very case quoted from in appellant's brief, p. 24, *Scott* v. *Donald*, 165 U. S. 107, that very clearly appears (p. 114). In passing, we may say that we are unable to find in the opinion in that case the language quoted by appellant and attributed to this

court. In *Bitterman* v. *Louisville & Nashville R. R.*, 207 U. S. 205, cited by appellant, it was said (p. 225):

> Besides the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced.

To bring himself within the principles of these cited cases, it would be necessary for appellant to assert or prove that *the right to have these payments made to him while he was under the influence of intoxicating liquors, or while such liquors were within convenient reach*, was of a value above $3,000, the jurisdictional amount.

We desire to emphasize the point that the income of appellant is not being taken away from him. It is not lost to him but is merely being withheld temporarily. It rests with him to remove the cause of the refusal to make payments.

III

Section 2087 was full warrant for the withholding of appellant's share of the income of the Osage Tribe; that such legislation is constitutional is too well settled to admit of doubt

No question is presented by this record of the correctness of the *facts* upon which the officials determined that payments to appellant were forbidden by §2087. The claim is that that section is inap-

plicable to these payments and was repealed as to them, and in any event is unconstitutional.

Section 2087 was but one of a series of enactments by Congress in furtherance of its avowed policy of absolute suppression of traffic in intoxicating liquors so far as the Indians are concerned. In this respect, a fixed and unchanging policy has been pursued with beneficial results. *United States Express Co.* v. *Friedman*, 191 Fed. 673; *United States* v. *Wright*, 229 U. S. 226, 237; *United States* v. *Birdsall*, 233 U. S. 223, 232.

All legislation affecting the Indians and their property must be construed in the light of this fixed and constant policy. *United States* v. *Sweet*, 245 U. S. 563. Section 2087 is broadly written—"no annuities, or money or goods, shall be paid or distributed." It has application to all payments; and properly it must have if it is to serve the purpose for which it was enacted. Therefore in every statute providing for payments of annuities or money or goods to Indians this section is incorporated by implication unless *expressly* or by plain intendment excluded. An intention to limit its scope or to exclude its operation, or to repeal it *pro tanto* in any particular instance, is not to be presumed, but, because of the policy in aid of which it was enacted, an intention to do so must be clearly expressed.

The Act of March 3, 1921, upon which appellant predicates his right to payment, makes no reference to § 2087; there is in it nothing which by any fair, indeed any strained, construction could be said to

indicate a purpose to restrain or qualify or modify its operation, or to repeal it *pro tanto* or otherwise.

Now there is no repugnancy between these two statutes. The Act of March 3, 1921, deals with income payments to Osages; §2087 deals with payments to all Indians. There is no reason why both acts can not be given effect.

The settled rule is that repeals by implication are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect can not reasonably be given to both. *Washington* v. *Miller*, 235 U. S. 422, 428. It is the duty of the court to give effect to both statutes, if possible. *United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601, 605.

United States v. *Healey*, *supra*, seems particularly in point. The question there presented was whether the original desert-land Act of 1877 providing that lands of the character thereby made subject to entry should be disposed of at $1.25 per acre superseded §2357, R. S., which required that public lands along the line of railroads within the limits granted by Congress be sold at $2.50 per acre. It was held that no repeal was effected and that desert lands within railroad limits were subject to the terms of § 2357.

We regard as controlling, in principle, *United States* v. *Barnes*, 222 U. S. 513. In that case it was sought to avoid the effect of § 3177, R. S., which authorized specified revenue officers to enter any

building or place where any articles or objects subject to tax are made, produced or kept, for the purpose of inspecting such articles or objects, and a refusal by any person to admit the officer, or to suffer an inspection of the articles or the hindering or preventing of such officer in the exercise of his power and authority, was made a penal offense. It was asserted that this statute was not applicable to the collection or enforcement of the tax imposed on oleomargarine under a later Act, because certain sections of the Revised Statutes were extended to the taxes imposed by the later Act, and hence those sections and no others were applicable.

Ruling against this contention and holding § 3177 applicable, this court said (p. 520):

> Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.

This principle was reiterated in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 384, thus:

> But as a general rule, where existing legislation on a particular subject has been systematically revised and restated in a compre-

> hensive general statute, * * * subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed.

The Indian Office has consistently construed §2087 to be applicable broadly to all payments made to Indians. In the Regulations of the Indian Office, effective April 1, 1904, §2087 is incorporated verbatim as §329 of those regulations. This construction by those in charge of the administration of the Act is entitled to great respect and is not to be lightly disregarded. *LaRoque* v. *United States*, 239 U. S. 62, 64; *Harris* v. *Bell*, 254 U. S. 103, 109; *McLaren* v. *Fleischer*, 256 U. S. 477, 481.

The claim of appellant that §2087, as applied to him is unconstitutional, is based upon the proposition that the money is his individual property which is protected by the Fifth Amendment. But the trouble with this assertion is that it leaves out of consideration the point that this money was placed to his individual credit pursuant to legislation of Congress. He is claiming under this legislation—without it, he would have no right. Therefore, as he must concede the power of Congress to provide for the distribution of interest, and bonus and royalties, he must necessarily also concede the power to impose conditions under which the distribution shall be made. Now, as we have seen, the provisions of

§2087 were, by implication, made a part of the legislation covering this distribution. Certainly appellant cannot rely upon the legislation and at the same time deny its validity. But even if he were in a position to attack the legislation under which he claims, he would be no better off. A survey of the enactments relating to the Osages will demonstrate this.

The Act of June 28, 1906, c. 3572, 34 Stat. 539, provided for the division of the lands and funds of the Osage Indians. After directing the manner in which the lands should be allotted so as to give each member his fair share, and which were to be inalienable for twenty-five years, except where the Secretary issued a certificate of competency under which the individual Indian might dispose of his *surplus* lands, it was declared, §2, 7th paragraph, p. 542:

> That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided.

And in §3, p. 543:

> That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years.

By §4, p. 544, it was provided:

> That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may

> become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided.

It is then provided that such funds shall be segregated and placed to the credit of the individual members of the tribe on a basis of pro rata division among the members or to their heirs, and that said credit shall draw interest as now authorized by law; this interest as it accrues to be paid quarterly to the members entitled thereto.

A further provision was that royalty received from mining leases should be placed in the Treasury to the credit of the individual members and be paid in the manner and at the same time that the payments are made of interest on the other moneys held in trust.

The Act of April 18, 1912, c. 83, 37 Stat. 86, upon which appellant lays so much stress as repealing all acts in conflict, did not make any provision touching payment of interest arising from the trust funds or the royalties accruing from leases—certainly none in conflict with the Act of 1906 in that regard.

A radical change was made by the Act of March 3, 1921, in the particulars already noted. Instead of paying to those without a certificate of competency all the income accruing quarterly, but $1,000 was to be paid if the income was sufficient to pay that sum.

From the foregoing it is clear that the royalties (which include bonus moneys—*Work* v. *Mosier*, 261

U. S. 352) were in the first instance tribal property. The individual Indian had no part in the making of the leases, for that was distinctly a matter affecting tribal property. As the royalties were tribal property, Congress had complete and plenary power to deal with them as it saw fit and could impose such terms and conditions upon their disbursement as it deemed best for the protection and welfare of the Indians. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Gritts* v. *Fisher*, 224 U. S. 640; *Sizemore* v. *Brady*, 235 U. S. 441.

Respecting the interest accruing on the trust funds placed to the credit of the individual Indians, we call attention to the fact that the United States is paying this interest. We do not think any one will question the right or authority of Congress in agreeing to pay interest, to impose conditions governing that payment.

Moreover, it is well to bear in mind that these Acts of Congress make provision for payments of income accruing in the future—before any individual right attached to it.

We confess to some difficulty in following the argument of appellant with respect to the operation of §2087. On page 17 of his brief he says that §2087 has to do with tribal property, and then in the next sentence but one he asserts that the section "was for the purpose of paying out *funds and goods of the United States.*"

However, we may meet him on both propositions. The royalty and bonus moneys are tribal property; the interest on the trust funds is money paid out of the United States funds. How much of each makes up the money here involved is not shown.

We do not, however, rest upon that but on a much broader consideration: Section 2087 has no qualification such as appellant applies to it. It declares that "no annuities, or moneys, or goods shall be paid or distributed," etc.

There is no sound reason why it should be construed to apply only to money of the United States. Indeed, considering the purpose of the statute and the policy behind it, there is every inducement to apply it to all payments made whether of the tribal funds or government funds.

The statute was designed to protect not the United States but the Indian. To construe it as appellant does would be to frustrate the purpose and policy of Congress. So far as the Indian is concerned, it would be just as bad to distribute his pro rata share of *tribal* money to him when drunk as it would be to distribute his pro rata share of *government* money.

On the merits the judgment should be affirmed.

JAMES M. BECK,
Solicitor General.
IRA K. WELLS,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General,

NOVEMBER, 1924.

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2. Under the Act of March 3, 1921, § 4, c. 120, 41 Stat. 1249, the power and responsibility in respect of the making of payments to incompetent Osage Indians are with the Secretary of the Interior, and neither the Superintendent of the Agency nor a disbursing agent has any primary authority in the matter. P. 510.
3. Therefore the Secretary is a necessary party to a suit by a member of the Osage Tribe to compel payments and attacking as unconstitutional a statute and orders and regulations of the Secretary under which payment was withheld. *Id. Gnerich* v. *Rutter*, 265 U. S. 388.
4. Questions which lurk in the record, neither ruled upon nor brought to the attention of the Court, are not to be considered as having been so decided as to constitute precedents. P. 511.

Reversed.

APPEAL from a decree of the District Court, dismissing, for want of equity, a bill for a mandatory injunction to compel payments of money to the plaintiff, an incompetent Osage Indian.

Mr. Preston A. Shinn for appellant.

In support of his contention that the Secretary of the Interior was not a necessary party, he cited: *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 505; *Hill* v. *Wallace*, 259 U. S. 44; *Chicago Board of Trade v. Olsen*, 262 U. S. 1; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386; *Waite* v. *Macy*, 246 U. S. 606; *Lipke* v. *Lederer*, 259 U. S. 557; *Corneli* v. *Moore*, 257 U. S. 491; *Ng Fung Ho* v. *White*, 259 U. S. 277; *National Life Ins. Co. of U. S.* v. *National Life Ins. Co.*, 209 U. S. 317; *Lewis Pub. Co.* v. *Morgan*, 229 U. S. 288; *Eastman* v. *Armstrong Co.*, 212 Fed. 662; *United States* v. *Lee*, 106 U. S. 196; *Swigart* v. *Baker*, 229 U. S. 187. *Gnerich* v. *Rutter*, 265 U. S. 388, distinguished.

Mr. Solicitor General Beck, *Mr. Assistant Attorney General Wells* and *Mr. H. L. Underwood*, Special Assistant to the Attorney General, appeared for appellees.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant, an adult member of the Osage Tribe of Indians and without a certificate of competency, brought this suit against the Secretary of the Interior, Wright, the Superintendent of the Osage Agency, and Wise, a Special Disbursing Agent charged with the duty of paying and disbursing funds and moneys due individual Osage Indians, to secure a mandatory injunction commanding and requiring that moneys and funds due appellant under the Act of March 3, 1921, § 4, c. 120, 41 Stat. 1249, 1250, be assigned and paid over to him, alleging that the same were being unlawfully withheld. The act requires the Secretary to cause to be paid to each adult member of the Osage Tribe not having a certificate of competency one thousand dollars quarterly, etc., payments to be made under the supervision of the Superintendent of the Osage Agency. But § 2087, Rev. Stats., provides: "No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquor, or while there are good and sufficient reasons leading the officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach of the Indians, etc." In virtue of this provision payments to appellant were refused. This refusal is attacked by the bill of complaint upon the ground that § 2087 and all orders, rules, or regulations issued thereunder by the Secretary of the Interior, in so far as appellant is concerned, are unconstitutional. The facts upon which it was determined that appellant came within the statutory prohibition are not in question.

There has been no service upon the Secretary and he has not appeared in the suit. The other defendants were served, the case went to trial, and the bill after a hear-

ing was dismissed for want of equity and on the merits. But the suit was one which required the presence of the Secretary, and the bill should have been dismissed for want of a necessary party. *Gnerich* v. *Rutter*, 265 U. S. 388; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, 34. The statutory direction to cause quarterly payments to be made (subject to § 2087) is addressed to the Secretary. The power and responsibility are his. Neither Wright nor Wise has any primary authority in the matter. They can act only under, and in virtue of, the Secretary's general or special direction. In the absence of it no payments or disbursements properly can be made. Authority in the Superintendent to supervise such payments is not authority to cause them to be made. The statement of this Court in the *Gnerich Case* (p. 391) is pertinent here: "They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied." In the *Smith Case*, suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to enjoin them from exercising further jurisdiction with respect to the disposition of certain public lands; from further trespassing upon complainant's right of quiet possession; and to command the issue of patents to plaintiff. The suit abated as to the Secretary because of his resignation, and it was held that it could not be continued against the Commissioner alone. We quote from the opinion (pp. 34–35): "The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To main-

tain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading."

Counsel for appellant directs our attention to other cases, where this Court proceeded to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. See *New* v. *Oklahoma*, 195 U. S. 252, 256; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 119; *United States* v. *More*, 3 Cr. 159, 172; *The Edward*, 1 Wheat. 261, 275–276. In any event, this case falls within the principles definitely established by the *Gnurich* and *Smith Cases*.

Decree reversed with directions to dismiss the bill for want of a necessary party.

WEBSTER *v.* FALL, SECRETARY OF THE INTERIOR, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 149. Argued December 11, 1924. Decided January 5, 1925.

1. A suit lacking a necessary party defendant should be dismissed on that ground without deciding the merits. P. 510.